Malaysia Building Society Bhd v Sentiasa Harum Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO C431 OF 1984
ARIFIN JAKA J
20 NOVEMBER 2002

Evidence *— Documentary evidence — Genuineness of document — Whether contract of guarantee signed by the second defendant — Burden and standard of proof*

The plaintiffs issued a writ against the first, second, third and fourth defendants. The claim against all the defendants was for the amount due and payable to the plaintiffs on a loan granted by the plaintiffs to the first defendant and guaranteed by the second, third and fourth defendants. The loan was also secured by a charge in favor of the plaintiffs over certain properties owned by the first defendant. Judgment was entered against the first, third and fourth defendants. Judgment in default of appearance was also entered against the second defendant which was subsequently set aside. The trial herein only concerned the plaintiffs' claim against the second defendant who shall be referred to hereinafter as 'the defendant'. The plaintiffs' claim was based on a contract of guarantee alleged to be executed by all the directors of the first defendant including the defendant. The sole issue to be determined at the trial was whether the defendant signed the guarantee.

Held:

Under s 101 of the Evidence Act 1950, the burden of proving the execution of the guarantee by the defendant is on the plaintiffs. The standard of proof required of the plaintiffs is on a balance of probabilities; *Kulasingam s/o Samuel v Resamah d/o Thambipillai* [1997] 1 MLJ 288 followed. On the evidence, the court found that the defendant was a director of the first defendant at the time the guarantee was executed. This fact was also corroborated by evidence. After considering the evidence in totality, the court came to a conclusion that the defendant had signed the guarantee which formed the basis of the plaintiffs' claim against the defendant as a guarantor (see pp 331H–332A, 334D, 336B).

[Bahasa Malaysia summary

Plaintif telah mengeluarkan writ terhadap defendan-defendan pertama, kedua, ketiga dan keempat. Tuntutan terhadap semua defendan-defendan adalah untuk jumlah yang kena dibayar kepada plaintif di atas suatu pinjaman yang diberikan oleh plaintif kepada defendan pertama dan dijaminkan oleh defendan-defendan kedua, ketiga dan keempat. Pinjaman itu juga dijamin oleh suatu gadaian yang memihak kepada plaintif di atas hartanah-hartanah yang dipunyai oleh defendan pertama. Penghakiman telah dimasukkan

terhadap defendan-defendan pertama, ketiga dan keempat. Penghakiman ingkar kehadiran juga telah dimasukkan terhadap defendan kedua, tetapi telah diketepikan. Perbicaraan ini hanya berkenaan tuntutan plaintif terhadap defendan kedua yang selepas ini akan dirujuk sebagai 'defendan tersebut'. Tuntutan plaintif berdasarkan perjanjian jaminan yang dikatakan telah disempurnakan oleh semua pengarah defendan pertama, termasuk defendan. Satu-satunya isu yang perlu ditentukan di perbicaraan adalah sama ada defendan telah menandatangani gerenti tersebut.

Diputuskan:

Di bawah s 101 Akta Keterangan 1950, beban membuktikan penyempurnaan jaminan tersebut oleh defendan adalah di atas plaintif. Standard bukti yang diperlukan daripada plaintif adalah pada imbangan kebarangkalian (lihat ms 331H–I); *Kulasingam s/o Samuel v Rasamah d/o Thambipillai* [1997] 1 MLJ 288 diikut. Pada keterangan, mahkamah telah mendapati bahawa defendan merupakan seorang pengarah defendan pertama pada masa jaminan tersebut disempurnakan. Fakta ini juga disokong oleh keterangan. Selepas menimbang keseluruhan keterangan, mahkamah telah membuat kesimpulan bahawa defendan telah menandatangani jaminan yang merupakan dasar tuntutan plaintif terhadap defendan sebagai penjamin (lihat ms 331H–332A, 334D, 336B).

Notes

For cases on genuineness of document, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1075–1076.

Cases referred to

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)

Kulasingam s/o Samuel v Rasamah d/o JV Thambipillai [1997] 1 MLJ 288 (folld)

Munusamy v PP [1987] 1 MLJ 492 (refd)

PP v Muhamed bin Sulaiman [1982] 2 MLJ 320 (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (refd)

Legislation referred to

Evidence Act 1950 ss 45(1), 101, 103, 114(g)

Wong Kian Kheong (*Leanne Koh* with him) (*Lee Hishammuddin*) for the plaintiff.

Walter Pereira (*Kamaruddin & Partners*) for the second defendant.

Arifin Jaka J: On 21 February 1984, the plaintiffs issued a writ against Sentiasa Harum Sdn Bhd ('the first defendant'), Tan Sri Ungku General Nasaruddin bin Ungku Mohamed ('the second defendant'), Dato' Haji Othman bin Mohd Sham ('the third defendant') and Mohd Ali bin Mohd Sharif ('the fourth defendant'). The claim against all the defendants is for RM1,475,529.68 inclusive of interest at the rate of 14%pa on a monthly rest basis as at 30 September 1983 being the amount due and payable to the plaintiffs on a loan granted by the plaintiffs to the first defendant and guaranteed by the second, third and fourth defendants. The loan was for the sum of RM1.2m and was also secured by a charge in favor of the plaintiffs over certain properties owned by the first defendant, all in the Mukim of Kuala Kubu Bahru, Selangor. Judgment was entered against the first, third and fourth defendants as early as in 1984. On 3 April 1984, judgment in default of appearance was also entered against the second defendant which was subsequently set aside by the order of the judge dated 28 February 1994. The second defendant filed his defence on 28 February 1994. The trial herein only concerns the plaintiffs' claim against the second defendant who shall be referred to hereinafter in this judgment as 'the defendant'. At the end of the trial I gave judgment in favor of the plaintiffs with costs.

At this stage it is necessary for me to state the reasons why there is a delay in writing this judgment. On 1 December 1999, almost one year after the judgment, the plaintiffs filed an application to amend the judgment sum from RM1,475,529.68 as stated in para 8(a) of the statement of claim to RM11,143,160.89 as at 28 August 1998. I dismissed the application with costs. It is to be noted that on 10 August 2001, the learned counsel for the defendant requested for a mention date in November as both parties were discussing about the whole claim. The counsel for the plaintiffs did not object to the request. When the application came up for mention on 20 November 2001, learned counsel for the defendant again requested for a further mention date and also requested that the decision on the plaintiffs' application and the grounds of judgment in this case be held back until the discussion between the parties to settle the plaintiffs' claim is finalized. Unfortunately, no settlement was reached and on 5 February 2002 the learned counsel for the defendant informed the court that the defendant has refused to see the counsel to enable him to get further instruction. On 21 February 2002, I delivered my decision on the plaintiffs' application whereby I dismissed the application with costs.

I shall now proceed with the grounds of judgment in this case. It is agreed by counsel for both parties that the sole issue to be determined at the trial is whether the defendant signed the guarantee (exh P4B). In order to better understand the issue it is necessary to set out the relevant parts of the pleadings.

The relevant parts of the statement of claim are paras 3 and 5 which read:

> (3) The second, third and fourth defendants are the guarantors of the first defendant.

A (5) By a guarantee agreement dated 4 March 1982, the second, third and fourth defendants, in consideration of the plaintiffs granting the aforesaid facilities to the first defendant, the said second, third and fourth defendants jointly and severally guaranteed payment of the said loan together with interest and costs and other charges relating to this action and all other sums payable by the first defendant to the plaintiffs. The plaintiff will refer to the said guarantee agreement at the trial for its full term and effect.

The part of the defence relevant to the issue to be decided is as follows:

(3) The second defendant would further state that the purported guarantee dated 4 March 1982 was never executed by the second defendant and neither was the second defendant present before the solicitor Francis Row to execute any guarantee.

(4) The second defendant would further allege that the purported signature of the second defendant on the guarantee dated 4 March 1982 was a forgery and the second defendant upon having knowledge of the said forgery had duly made a police report on 8 March 1988.

D The facts of this case are in my view straightforward. The plaintiffs' claim is based on a contract of guarantee alleged to be executed by all the directors of the first defendant including the defendant. A copy of the contract of guarantee is at encl 13 (exh P4B) in the plaintiffs' first bundle of documents (PB1). It is not in dispute that the plaintiffs had received the contract of E guarantee from Mr Anthony John Dason (SP5) an advocate and solicitor practicing with the legal firm of Dason & Co. In the course of the proceedings on 18 November 1997, the following facts are also agreed by both parties:

(a) the plaintiffs had granted to the first defendant a bridging loan of F RM1.2m;

(b) this loan was to be guaranteed by all directors of the first defendant including the second defendant at that time and was also secured by a charge over certain properties owned by the first defendant;

(c) the plaintiffs had disbursed the sum of RM1.2m to Messrs Dason & G Co;

(d) by reason of the default of the first defendant in the repayment of the said loan to the plaintiffs, the said properties charged to the plaintiffs had been sold by public auction and a sum of RM365,029.70 was realized. It is also not disputed by both parties that the amount due to the plaintiffs under the guarantee as at 31 December 1996 was H RM8,842,899.46.

It is the plaintiffs' case that their claim against the defendant is based on the guarantee ('P4B'). Before considering the evidence in detail, it is appropriate at this stage to state briefly the onus of proving the genuineness of the signature of the defendant in P4B. Under s 101 of the Evidence Act I 1950, the burden of proving the execution of P4B by the defendant is on the plaintiffs. The standard of proof required of the plaintiffs is on a balance of probabilities (see *Kulasingam s/o Samuel v Rasamah d/o*

JV Thambipillai [1997] 1 MLJ 288). In this case, the issue was whether a declaration which was adduced as evidence was executed by the defendant (respondent). The defendant denied that she had executed the declaration. On the onus of proof at p 295 it is stated that the appellant had to show on the balance of probabilities that the signature was that of the defendant. Having said that, I shall now consider the relevant evidence adduced by the plaintiffs. An advocate and solicitor in the person of Mr Anthony John Dason ('SP5'), practicing under the style of Dason & Co was one of the witnesses called by the plaintiffs. In his testimony, SP5 said that on the instructions of the plaintiffs vide a letter dated 21 January 1982, his firm prepared the necessary loan documents and the security documents for the loan of RM1.2m to the first defendant which included a guarantee (P4B) executed by all the directors of the first defendant which included the defendant who was at the material time one of the directors of the first defendant. He further testified that the solicitor who witnessed the signature of the defendant is Mr Francis Row who was at the material time a legal assistant with his firm who has since left the firm and migrated to Australia. In cross- examination, SP5 admitted that he did not meet the defendant at the time the defendant signed P4B but said that he could supply the address of Mr Francis Row to anyone who would require the same. He also testified that on 18 April 1985 he wrote to the managing director of the plaintiffs (p 123 in P4B) wherein he conveyed to the plaintiffs that the directors of the first defendants, at a meeting held on 16 April 1985, reviewed a proposal to a joint venture development of the lands charged to the plaintiffs with UMNO cawangan Kuala Kubu Bahru. It was suggested that a joint meeting be convened at the plaintiffs' office in the presence of the plaintiffs' solicitors in the week beginning 29 April. It was also requested that the plaintiffs stay proceedings against the first defendant and the guarantors for the loan pending the outcome of the meeting. Copies of the letter were extended to all the directors including the defendant.

A B C D E F

The plaintiffs also called Pn Norsiah bte Mohd Yusoff ('SP6') who was at the material time a document examiner from the Department of Chemistry. She gave expert evidence on the genuineness of the defendant's signature in the guarantee (P4B). The opinion of an expert is relevant under s 45(1) of the Evidence Act 1950. The question to be considered is whether SP6 is an expert in questions as to the identity or genuineness of handwriting.

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In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, Hashim Yeop A Sani J (as he then was) considered the question who an expert witness was and had this to say at p 255:

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> To qualify to give such evidence the witness must satisfy the court that he is indeed an expert, that he is specially skilled in the field of the enquiry carried out by him. An expert is one who is skilled in any particular art, trade or profession being possessed of peculiar knowledge concerning the same. The witness must have made a special study of the subject or have acquired special experience on the subject. A similar question arose in the case of *R v Silverlock* [1894] 2 QB7 766 at p 771 where handwriting was in issue, and of the person

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A to give expert evidence Lord Russell of Killowen CJ said 'Is he peritus? Is he skilled? Has he an adequate knowledge?'.

It has also been said by Suffian LP in *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320 that the witness need not become so skilled in any particular way nor by special study nor professionally. It is enough if he B has sufficient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge.

Puan Norsiah (SP6) stated in her testimony that she graduated with a degree of BSc Chemistry from the University of Leeds, England. She started work as a document examiner with the Department of Chemistry since February 1980. She had also attended a training session in document C examination for two years with the Police Department in New South Wales, Australia. She is involved in the examination of handwriting in documents including signatures in the course of her daily work as a document examiner.

She had also given evidence in the lower and High Courts about four times in a month. Upon scrutinizing her background, I am more than D convinced that Pn Norsiah is a competent expert in handwriting. Having found that she is an expert, it is now necessary for me to consider her testimony whether it should be accepted as evidence to show that the guarantee (P4B) was signed by the defendant. She testified that at the request of the plaintiffs' counsel Messrs Tunku Zuhri, Manan & Abdullah she carried out an examination of the defendant's signature ('A1') in the E guarantee (P4B) by comparing A1 with specimen signatures of the defendant supplied to her. It is to be noted that the original specimen signatures were returned to Messrs Tunku Zuhri Manan & Abdullah but she kept with her photographs of the signatures which are exhs P9A–P9J. The learned counsel for the defendant objected to the photographs being produced and marked as exhibits on the ground that the letters bearing the F signatures were not produced. I overruled the objection for the reason that we are concerned with the signatures and not the letters. The photographs were taken by the witness (SP6) herself and I have no doubt whatsoever that the signatures as shown in P9A–P9J were the signatures compared with the defendant's signature (A1), the impugned signature. The photographs are G admissible as the original specimen signatures could not be retrieved from Messrs Tunku Zuhri Manan & Abdullah as the firm has closed down. This is a reasonable explanation why the original documents containing the sample signatures of the defendant could not be produced. I accept this explanation and allowed the photographs to be admitted as evidence. Furthermore SP6 was never challenged that P9A–P9J were not the H specimen signatures which she used as comparison in the course of her examination which she carried out in coming to the conclusion that A1 was the signature of the defendant. SP6 gave reasons for arriving at the conclusion. She testified that she was able to detect characteristics in A1 which she also found to be similar in the specimen signatures. These characteristics are the pressure applied in signing, the shading of the strokes I in question, the position of the pen used in signing, the fluency of the strokes, the speed and the line quality. She concluded that the defendant's signature (A1) is one signature which was difficult to forge.

In his defence, the defendant alleged that the signature A1 in P4B is not his as it has been forged. It is trite that the burden of proof that the signature is a forgery lies on the defendant on a balance probabilities (*United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 and *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62).

In support of his case, the defendant himself gave evidence. His evidence was short and brief. He testified that he did not sign the guarantee (P4B) and categorically denied that the signature (A1) in P4B was his and alleged that the signature is a forgery. He suspected that Dato' Fathir could have forged his signature because Dato' Fathir was an expert in forgery as he was taken to court for forgery of air travel warrant. No further details of the alleged forgery by Dato' Fathir was given. This is a mere allegation and only the defendant's suspicion. Suspicion is not proof of forgery by Dato' Fathir in this case. I therefore, without any hesitation, reject the contention that Dato' Fathir could have forged the signature. The defendant also said in his evidence that he did not know he was a director of the first defendant as nobody told him he was a director. It is clear from the documents filed with the Registrar of Companies that the defendant was appointed a director of the first defendant with effect from 19 May 1981 and he resigned as a director effective 27 February 1984. He signed all these documents pertaining to his appointment and resignation as director. On this evidence I found that he was a director of the first defendant at the time the guarantee (P4B) was executed. This fact is also corroborated by the evidence of Anthony John Dason (SP5) who testified that at the time the guarantee (P4B) was executed the defendant was one of the directors of the first defendant. The contention of the defendant that he was not a director of the first defendant at the material time is therefore baseless and has to be rejected.

The defendant also said that he could not recall whether he appeared before Mr Francis Row and signed the guarantee (P4B) and he also said he never knew Francis Row. This is contrary to what Anthony John Dason (SP5) said that the execution of the guarantee (P4B) was witnessed by Francis Row. Anthony John Dason was very positive about this and his evidence on this point was not challenged. There is no reason for me to disbelieve this witness. This is direct evidence of execution of the guarantee by the defendant. On this issue, the defendant's solicitors submitted that the plaintiff should call Francis Row as a witness to prove that the defendant signed the guarantee (P4B). The learned defence counsel urged this court to invoke s 114(g) of the Evidence Act 1950 and to draw an adverse inference against the plaintiff for failing to call Francis Row. It is trite that adverse inferences under illustration (g) under s 114 can only be drawn if there is withholding or suppression of evidence (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492. In the present case, it is explained by Anthony John Dason (SP5) that Francis Row has migrated to Australia and his whereabouts is known. His address can be supplied to anyone who wants the address. It is clear that there is no withholding of evidence by the plaintiffs. The defendant could have taken positive steps to bring Francis Row to court as his witness. It is indeed incumbent upon the defendant to

call Francis Row as his witness as the burden of proof is on him to prove forgery on the balance of probabilities. Section 103 of the Evidence Act 1950 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person.

The defendant called as his second witness Balansangam s/o Vadivelo (SD2) as a handwriting expert to prove that his alleged signature (A1) in P4B is a forgery. At the outset, it is essential to consider whether it can be accepted that Balansangam is a handwriting expert. Before his evidence can be accepted as evidence of an expert, I must first be satisfied as to his qualification or experience as a handwriting expert or qualified document examiner. He claims to be an expert on the identification of handwriting and signatures. His qualification as stated by him when he gave evidence is a BSc Degree in Criminology and Forensic Science from Karataka University India. He claims that he has been practising for the past 20 years but he did not state that he has been practising as a handwriting expert or a qualified document examiner. He stated that he is a bank officer by profession and in cross-examination he unhesitatingly confirmed that he is the Assistant Vice President of the Bank of Commerce and in that capacity he does not normally deal with examination of documents. He also agreed in cross-examination that in his usual job as an assistant vice president of the bank he does not deal with analyzing signature in documents. On this evidence, it is not difficult to ascertain that he does not have sufficient practical experience to acquire the necessary skill so that he has adequate knowledge in this field of handwriting analysis. His qualification itself does not reflect that he is a handwriting expert or a qualified document examiner. He also maintained that he has given evidence in about 100 cases in Malaysian courts but unfortunately he is not aware whether his opinion as an expert has been accepted by the court. I find it difficult to believe that he has given expert evidence in handwriting analysis in courts in about 100 cases and at the same time telling this court that he is not aware whether his expert opinion has been accepted and more so when there is no evidence to show that he is skilled in the field of handwriting analysis and he is not practising in this field. The acid test of whether a person in an expert is whether he is peritus, as what I had stated earlier in this judgment. I find it difficult to say with certainty that this witness is peritus without any further and additional proof of his qualification other than that he possesses a BSc Degree in Criminology or his experience. Under these circumstances, I am not prepared to recognize that this witness is a handwriting expert and consequently there is no necessity for me to consider his opinion. I therefore reject his so called expert opinion on the ground that he is not an expert. In any event this witness did not consider the specimen signatures of the defendant which are in exhs P9A–J which were used by the plaintiffs' expert witness (SP6) for comparison with the impugned signature (A1), but instead he used specimen signatures of the defendant in exh D7 (which he identified as S1–S12) for comparison with the impugned signature (A1). It is to be noted that these specimen signatures are not contemporaneous with the impugned signature (A1). It is admitted by him in cross-examination

that using specimen signatures which are contemporaneous with the impugned signature is preferred. It is also pertinent to note that the plaintiffs' expert witness, SP6, considered the defendant's specimen signature exh D7 (S1–S12) and came to a conclusion that the defendant had indeed signed P4B. I find that the evidence of SD2 is not acceptable as he is not an expert. On the totality of the evidence adduced on behalf of the defendant, I find that the defendant has failed to prove forgery of the impugned signature (A1) in P4B.

After carefully considering the evidence in totality and the written submissions of counsel for both parties, I came to the conclusion that the defendant signed the guarantee P4B which formed the basis of the plaintiffs' claim against the defendant as a guarantor. In the premise, I gave judgment for the plaintiff as prayed under para (a) of the statement of claim for the sum of RM8,842,899.46 as at 31 December 1996 and interest under para (b) at the rate of 14%pa from 1 January 1997 to the date of full settlement and costs.

Order accordingly.

Reported by Peter Ling